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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 814

W. M. DANIELS, *Appellant*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Appellant's Brief Opposing Appellees' Motions to Affirm

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Pursuant to Rule 16, paragraph (3), Revised Rules of this Honorable Court, Appellant, W. M. DANIELS, files this brief in opposition to motions to affirm.

STATEMENT

This proceeding involves the interpretation of Secs. 201 et seq., Title 49 U. S. C., Federal Motor Carrier Act of 1935, and the eligibility for registration under said Act of the interstate certificate

issued to appellant in 1933 under the Montana Motor Carrier Act of 1931.

Appellant contends the statute, Sec. 206(a)(1), second proviso, means just what it says. Where is there any wording in the statute which states as a condition precedent to registering a state-issued interstate certificate that the carrier must possess an intrastate certificate? We find no such provision in the statute.

The issue is a recurring one requiring interpretation of Sec. 206(a)(1), second proviso, Title 49, U. S. C., by this Honorable Court to finally determine the intention of Congress in respect to the mutual comity and cooperation between the federal and state governments at the time of the passage of the Federal Act on April 16, 1935.

ARGUMENT

Senator Burton K. Wheeler, Senator from Montana and Chairman of the Interstate Commerce Committee of the Senate, immediately prior to the vote upon the Federal Act of 1935 explained the grant and delegation of power under the commerce clause to the States as follows:

> "Where a common carrier is engaged in interstate transportation but conducts his operations solely within a State and holds a certificate

> from that State, he is not required to apply for a federal certificate but is otherwise subject to federal registration." (72 Congressional Record, p. 5654).

Appellant relies upon the plain language of Sec. 206(a)(1) that the interstate certificate issued to him in 1933 by the Montana board is eligible for registration with the Interstate Commerce Commission, which contention is supported by the explanation of Senator Burton K. Wheeler as above quoted.

Sec. 206(a)(1), second proviso, Title 49 U. S. C., provides:

> "* * * and provided further, that this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a Board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such Board."

Congress did not expressly nor impliedly terminate or cancel any State-issued interstate certificates which were known to be in existence. As appears from the decisions of this Court and State and lower federal courts, many State-issued interstate certificates had been in existence for many years prior to

the Federal Act of 1935. Congress must have been well aware of the outstanding State-issued interstate certificates, some of which were required to be issued by decisions of this court and other courts throughout the country. Congress recognized previously issued interstate certificates by the grant and delegation of power to the States as expressly provided in Sec. 206(a)(1).

Administrative Ruling No. 7 by the Director of Bureau of Motor Carriers, dated August 19, 1936, provides for extensions by the States of certificates held by carriers operating in interstate commerce solely within a single State if the carrier procured a certificate of convenience and necessity from the Board of a State authorizing the extension and no proceedings other than registration with the Interstate Commerce Commission being required for such authority to be recognized as interstate authority. (J. S. p. 54).

Administrative Ruling No. 5 by the Director of Bureau of Motor Carriers, dated August 19, 1936, which is relied upon by appellee Commission for its refusal to register the State-issued interstate certificate involved herein, constitutes unlawful legislating by interpretation, for the reason that the provisions of Sec. 206(a)(1), Title 49, U. S. C., do not require as a condition precedent for lawful operations under

either the State or Federal Acts for the transportation of property in interstate commerce solely between points within the State of Montana intrastate that the carrier herein, the appellant, must possess an intrastate certificate for the transportation of property in intrastate commerce between points within the State of Montana. (J. S., p. 5, 6. On line 10 of page 15 of J. S., reference to Director's Ruling No. 7 should read No. 5, and the same change to be made on line 2 of page 16 of J. S.).

AUTHORITIES

Decisions of this Court relied upon by appellees were decided prior to the enactment of the Federal Motor Carrier Act of 1935 wherein consideration was no tgiven to the grant and delegation of powers to the States by Congress in 1935 as herein contended by appellant.

Oswego Transportation Lines v. Feinberg, 181 N.Y.S. 2d 1007; aff'd. 219, N.Y.S. 2d 409, 276 N.E. 2d 916 (J. S., p. 11).

VALIDITY OF STATE STATUTES

Mr. Justice McReynolds in the dissent in Buck v. Kuykendall, 267 U.S. 307, (1925), and Bush & Sons v. Maloy, 267 U.S. 317, (1925), cites Olsen v.

Smith, 195 U.S. 332, 341, re to the determination of the validity of State statutes by State courts, viz:

> "For the purpose of determining the validity of state statutes in their Federal aspect, this court accepts the interpretation given to the statute by the state court and tests their validity accordingly."

The Montana Supreme Court in Interstate Transit Co. v. Derr (1924), ___Mont.:___, 22 P. 624, interpreted the earlier Montana Motor Carrier Act which contains provisions similar to those used in the Montana Motor Carrier Act of 1931; (Sec. 8-123, R.C.M. 1947, J.S. 45), as follows:

> "Was it the intention of the Legislature in enacting Chapter 154 that the same should apply at all to interstate commerce? If it was not, then clearly no compliance with its provisions on the part of the plaintiff is required. Section 10 of the act above quoted seems to answer that question, since it provides that the provisions of the act shall not be construed to apply to commerce among the states, except insofar as may be permitted by the Constitution of the United States and the acts of Congress, indicating a clear legislative intent that its provisions shall apply to interstate traffic insofar as the Constitution and the acts of Congress permit. * * *."
>
> "It is, of course, a fundamental principle of law that a state may not directly regulate, prohibit, or burden interstate commerce. Gibbons v. Ogden, 9 Wheat 1, 6 L. Ed. 23."

In view of the foregoing interpretation of the language of the Montana Act, it should be held to be constitutional and that appellant's State-issued interstate certificate authorizing the transportation of propery in interstate commerce is a valid and lawful certificate authorizing the operations therein provided, without being subject to the statutory penalties under the Federal Act.

The Montana Board both prior to and after the enactment of the Federal Motor Carrier Act of 1935 possessed no discretionary power to withhold certificates of public convenience and necessity from common carrier motor carriers engaged exclusively in interstate commerce between points within the State of Montana as provided in appellant's interstate certificate. Savings provisions of Act (J. S., p. 46.).

Atlantic-Pacific Stages v. Stahl, (1929), D. C., 36 F. 2d 260; 85 A.L.R. 1138; 109 A.L.R. 1235.

Fry Roofing Co. v. Word (1952), 344 U.S. 157, 73 S. Ct. 168, 97 L. Ed. 168.

Stephenson v. Binford, (1931) D. C., 53 F. 2d 509, affirmed on other grounds (1932) 287 U.S. 251, 77 L. Ed. 288, 53 S. Ct. 181, 87 A.L.R. 721.

The Montana board originally issued the Class "A" common carrier motor carrier interstate permit as a certificate of public convenience and necessity in 1933 because the application sought the operation

between fixed termini and over a regular route. Class "B" certificates were issued to carriers operating under regular rates or charges and not between fixed termini or over a regular route. Class "C" certificates were issued to carriers operating under contract, charter, agreement or undertaking.

Appellee Commission admits the certificate in question dated March 8, 1943, was effective prior to the effective date of the Motor Carrier Act of 1935. No question was ever raised before in respect to the validity of the certificate or its recognition by the Interstate Commerce Commission, although it had knowledge of the existence of the certificate. No showing appears in the record that the Montana board or courts construed the Montana Act to intend that the State of Montana could decide for itself which carriers were or were not to engage in interstate operations.

Other intrastate and interstate certificates were held by appellant at various times but any proceedings had before the appellee Commission in respect to those certificates should not be confused with the interstate certificate involved herein which is separate and distinct. No prior attempts have been made by appellant to qualify this certificate under the Federal Act that would bar this proceeding and litigation. The proceedings to which the lower court

refers at page 40 of the J. S. pertained to a Class "C" contract carrier certificate issued May 13, 1936, and found not to be a common carrier certificate, *decided in 1942* and reported in 32 M.C.C. 585. It was *in 1957* the Montana Supreme Court upheld the validity and existence of the interstate certificate involved herein. (W. M. Daniels v. Board of Railroad Commissioners, 131 Mont. 9, 306 Pac. 2d 264).

CONCLUSION

Appellees' motions to affirm are without merit and should be denied. The judgment of the lower three-judge court should be reversed without further argument and judgment entered in favor of appellant and motion is made therefor by appellant.

Respectfully submitted.

JOHN W. BONNER,
SIDNEY O. SMITH,
Attorneys for Appellant.

CERTIFICATE OF SERVICE

I, JOHN W. BONNER, one of the attorneys for the appellant, W. M. Daniels, do hereby certify that a copy of this brief in opposition to appellees' motions and briefs to affirm and authorities supporting appellees' appeal, was mailed by me on the ..... day of March, 1963, at Helena, Montana, and directed to the following attorneys:

Moody Brickett, United States District Attorney, Federal Building, Butte, Montana;

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